The American Federation of State, County and Municipal Employees and James Smith. Case 31-CA-9004

July 15, 1982

## **DECISION AND ORDER**

On October 21, 1980, Administrative Law Judge James M. Kennedy issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief, and the Respondent filed cross-exceptions and a brief in support thereof as well as a brief in answer to the General Counsel's exceptions.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order.

#### ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the complaint be, and it hereby is, dismissed in its entirety.

#### DECISION

## STATEMENT OF THE CASE

JAMES M. KENNEDY, Administrative Law Judge: This case was heard before me in Los Angeles, California, on June 19 and 20, 1980, pursuant to a complaint issued by the Regional Director for Region 31 of the National Labor Relations Board on July 13, 1979, and which is based on a charge filed by James Smith, an individual (herein called Smith), on May 21. The complaint alleges that the American Federation of State, County and Municipal Employees (herein called Respondent or AFSCME) has engaged in certain violations of Section 8(a)(1) and (3) of the National Labor Relations Act, as amended (herein called the Act).

#### Issues

Whether or not Respondent violated the Act by telling Smith not to testify in a state court civil suit, threatening him with job loss if he did, and discharging him for actually doing so. In this regard it should be observed that the plaintiff in the civil suit was a statutory supervisor apparently attempting to vindicate certain personal rights under a strike settlement agreement between her former All parties were given full opportunity to particute introduce relevant evidence, to examine and croamine witnesses, to argue orally, and to file briefs. By which have been carefully considered, were file behalf of the General Counsel and Respondent.

Upon the entire record of the case, and from my servation of the witnesses and their demeanor, the following:

#### FINDINGS OF FACT

#### I. JURISDICTION

Respondent admits that it is a labor organization pearing here in its capacity as an employer. It is an corporated association having an office in Los An California. The parties have stipulated that in the cand conduct of its business, Respondent annually mits dues in excess of \$50,000 to its International located outside California and that its annual grown enues exceed \$500,000. Accordingly, I find it to employer engaged in commerce and in a business ing commerce within the meaning of Section 263 and (7) of the Act.

#### II. THE LABOR ORGANIZATION INVOLVED

Respondent admits, and I find, that the CASS Guild (herein called the Guild) is a labor organ within the meaning of Section 2(5) of the Act.

#### III. THE ALLEGED UNFAIR LABOR PRACTICES

### A. Background and Participants

With respect to the background and the transacted leged to be protected concerted activity as defined Section 7 of the Act there is little dispute. Immerior to October 1, 1978, Clerical and Allied Employees (herein called CASE) was an independent of the control of the control

According to a stipulation of the parties, on 1978, Geraldine Johnson was terminated from tion as CASE director and between May 1 as Guild's members struck CASE to protect Johnsonination. They returned to work after a settle reached between CASE and the Guild which that Johnson would be given a hearing to review

<sup>&</sup>lt;sup>1</sup> Having found, in agreement with the Administrative Law Judge, that the discharge of the Charging Party, James Smith, did not violate Sec. 8(a)(3) and (1) of the Act, we find it unnecessary to pass on the Respondent's cross-exceptions.

employer and the labor union which represented in ployees and that Smith, though a former employee of defendant in the suit, in the meantime had become employee of Respondent and was no longer employed that union.

<sup>&</sup>lt;sup>1</sup> All dates herein refer to 1979 unless otherwise indicated.

<sup>&</sup>lt;sup>2</sup> On this record it is not clear that CASE actually employ

and that Smith would become the interim direc-

that Smith served as CASE's interim director that time until September 1978 when CASE entate an affiliation agreement with Respondent and one of Respondent's chartered locals. The stipularther recites that CASE ceased to exist as an intent, unaffiliated labor organization.<sup>3</sup>

October 1, 1978, Smith, Parisi, and Floyd were by Respondent as temporary project staffers for oring campaigns elsewhere in California. In this It appears that at least Smith and Parisi were oblito move from Sacramento to Los Angeles. It is not where Floyd went immediately, though since that the has become a business agent for AFSCME's edi 57 in Oakland.

ith and Parisi, upon their employment with Redent in Los Angeles, were under the supervision of endent's area director, Vernon Watkins, whose was in Los Angeles. Ray Tharp was the coordinatre organizing campaign to which they were asthe Tharp was officed in Sacramento.

noted the parties stipulated that the strike settleagreement between CASE and the Guild provided ohnson would be given a hearing to review her terion. The strike settlement agreement is not in the and other than the stipulation there is no evidence rding any of its terms. CASE's executive board conthe hearing to review Johnson's termination on 15, 1978. Thereafter Johnson, dissatisfied with the filed a lawsuit in Sacramento county superior alleging that CASE had breached the agreement. original trial date for that action was set in early ary 1979 and about January 19, Smith received a sena to testify in that trial; likewise, so did Parisi Ployd. It appears from the testimony of Floyd that build, at the request of Johnson's attorney, lent its to Johnson's suit but did nothing else directly to or finance it. 5 Floyd understood that the reason wyer wished to add the Guild to the suit was to third party beneficiary legal problems.

# The General Counsel's Theory Regarding Smith's Discharge

General Counsel presented evidence to the effect prior to the superior court trial in the Johnson tel. Smith advised Watkins that he had been subpocto testify. He then presented Smith's testimony that ins told Smith not to testify in that matter and tened to discharge him if he did so. The trial was ctually conducted until April 4 and was also attending Parisi and Floyd. It should be observed that, alth for the purpose of dealing with the General

Counsel's theory here, I am accepting Smith's testimony at face value, though there is reason to doubt it.

Accepting Smith's version of the threats as true for the purpose of this analysis, it seems to me that the General Counsel's case regarding both the threats and Smith's discharge depends on a showing that at some stage Smith engaged or would have engaged in conduct protected by Section 7 of the Act. Whether that has been shown or not, I think it likely that the General Counsel has proven that Watkins discharged Smith for testifying in that proceeding, despite the fact that Parisi was not so treated. Nonetheless, I must first analyze the question of whether or not Smith engaged in, or intended to engage in, activity protected by Section 7.

First, it is clear from Floyd's uncontroverted testimony that Johnson as the CASE director was a statutory supervisor within the meaning of Section 2(11) of the Act. She had the authority to hire and fire, to transfer employees, and to adjust their grievances. I find, therefore, that in addition to being a supervisor within the meaning of Section 2(11) of the Act she was also management's representative for the purpose of collective bargaining and/or the adjustment of grievances as defined by Section 8(b)(1)(B) of the Act. Not only was she the employees' immediate supervisor, but she was also specially charged with all day-to-day management functions; she was responsible solely to CASE's executive board.

In that circumstance it is important to determine what the Guild's purpose was when it struck to protest her discharge. Unfortunately the record is virtually silent with respect to the underlying purpose. The stipulation simply does not deal with it. The Board has held that if the employees' purpose in striking to protest the discharge of a supervisor is to influence the employer's choice of supervisor in order to have an impact on the employees' job interests the conduct is protected by Section 7. See Plastilite Corporation, 153 NLRB 180 at 182 and 183-184, (1965), enfd. in pertinent part 375 F.2d 343 (8th Cir. 1967), and cases cited therein.8 For the most part these cases, with the possible exception of Abilities and Goodwill, supra, rely on facts showing that the employees had a close connection to the discharged supervisor and that they could reasonably expect the change to have a negative impact on their terms and conditions of employment.9 The other side of the coin is the cir-

then CASE affiliated with Respondent, the Guild chose not to seek representative status for the new local's employees. If selld now exists at all it is essentially dormant.

be fact that they were subpoensed is immaterial here. From their soor and testimony it was obvious to me that all three wanted to honson. They probably would have done so without the subpoe-

Guild did contribute money to Johnson's "defense fund" which wed the money to pay her lawyer.

<sup>&</sup>lt;sup>6</sup> Both Parisi and Floyd also discussed their subpoenas with Watkins, but neither described Watkins' comments in the same fashion. In essence they both testified that Watkins simply asked them to avoid giving the court the appearance that their testimony was the official version of AFSCME.

<sup>&</sup>lt;sup>7</sup> By this time Floyd was no longer employed by AFSCME proper and was not subject to Watkins' direct authority; she was in Oakland employed by AFSCME's Council 57.

<sup>&</sup>lt;sup>8</sup> More recent cases to that effect include F.C.F. Papers, Inc., a Division of The Mead Corporation, 211 NLRB 657 at 658 (1974); Abilities and Goodwill, Inc., 241 NLRB 27 (1979), enforcement denied 612 F.2d 6 (1st Cir.); Puerto Rico Food Products, Corp., Tradewinds Food, Inc. and Island Can Corp., 242 NLRB 899 (1979), enforcement denied 619 F.2d 153 (1st Cir. 1980); and Bide-A-Wee Home Association, 248 NLRB 854 (1980).

<sup>&</sup>lt;sup>9</sup> The supervisor in Abilities and Goodwill was, according to the Board, a department head, but, according to the court, "the second-highest ranking management official." In contrast, Johnson was CASE's highest-ranking management official.

cumstance where the employees' protest is not out of concern for themselves and their working conditions but because they are concerned about the personal loss being suffered by the supervisor. As the United States Court of Appeals for the First Circuit said in Puerto Rico Food Products Corp. v. N.L.R.B., supra at 2305, "Mere sympathy for the economic well-being of a discharged supervisor divorced from any employee employment-related concern of their own . . . would not qualify [as an activity protected by Section 7] . . . . Generally, 'strikes over changes in even low-level supervisory personnel are not protected." See also Permaglas Div., Guardian Industries Corp., 210 NLRB 184 (1974). Of course the reasoning in these cases obviously comes from the language of Section 7 itself. In pertinent part that statute says: "Employees shall have the right . . . to engage in other concerted activities for the purpose of . . . mutual aid or protection." The phrase "mutual aid or protection" has always been interpreted to relate to the job-oriented interests of statutory employees. If those employees are striking simply for the purpose of assisting a supervisor in his or her personal plight, they are, by definition not seeking "mutual aid or protection," since the supervisor is not an employee.

The Board recently inversely reaffirmed that view in *Puerto Rico Food Products Corp., supra*, saying, "In this regard [we have] consistently held that where facts establish that the identity and capability of the supervisor involved has a direct impact on the employees' own job interests they are legitimately concerned with his identity and thereby have a protected right to protest his termi-

nation."

Of course the burden is on the General Counsel to prove that the employees' strike did have a direct impact on their own job interests. By way of proving this ultimate fact the only evidence in the record is the stipulation which states in essence that on April 30, 1978, Johnson was terminated from her position as director of CASE by its executive board and that from May 1 to 10, 1978, the CASE employees struck to protest her termination. There is no reference whatsoever in that stipulation to the underlying nature of their protest. Were they seeking to influence the identity of their immediate supervisor as it impacted their actual working conditions or were they simply assisting Johnson in her hour of need? Perhaps some element of purpose could be gleaned from the strike settlement agreement itself, but it is not in this record. The only reference to it is the stipulation which recites that the strike ended after a settlement was reached between CASE and the Guild providing that Johnson would be given a hearing to review her termination. If anything that terms suggests that Johnson's personal situation was the Guild's concern, not the working conditions of CASE's employees.

In that circumstance, I am not persuaded that the General Counsel has proven that the Guild, by its strike, was attempting to influence the working conditions of its membership. In fact, Floyd's testimony that the Guild's name was added to Johnson's suit as a merely pro forma matter, if anything, tends to buttress the suggestion that the Guild was interested only in attempting to assist Johnson in vindicating rights she perceived under the

strike settlement agreement. Accordingly, I conthat the General Counsel has failed to prove that Guild's strike to protest Johnson's termination had purpose a protest over the conditions of its member employment. The stronger inference to be drawn is its purpose was to assist Johnson in getting her job b Accordingly, I hold that at this stage of the transacthe Guild's strike was not protected by Section 7.

Moreover, aside from the question of the Gui actual purpose in either the strike or in lending its me to the lawsuit, it was probably violating Sect 8(b)(1)(B) by attempting to restrain or coerce CASI the selection of its representative for the purpose of elective bargaining and/or adjustment of grievance. Thus, in that sense the strike was not only unprotected.

but also had an illegal aspect to it.10

However, it may be argued that whether or not t strike was protected it culminated in a strike settleme agreement, an enforceable contract between a labor of ganization and an employer. It has generally been he that such contracts are quasi-collective-bargaining agre ments and are enforceable. United Aircraft Corporatu (Pratt & Whitney Division), 192 NLRB 382 (1971), 11 manded 525 F.2d 237 (2d Cir. 1975). From the premise is further argued that attempts to enforce a collective bargaining agreement (or in this case a quasi-collective bargaining agreement) is a protected act in and of itself Cases tending to support that view include Merin Bunney and Clarence Bunney, partners, d/b/a Bunney Bros. Construction Company, 139 NLRB 1516 (1962), and N.L.R.B. v. Interboro Contractors, Inc., 388 F.2d 495 (24 Cir. 1967). In this analysis it matters little whether the enforcement is one of self-help such as striking or one at law. Altex Ready Mix Concrete Corporation, 223 NI HI 696 (1976), enfd. 542 F.2d 295 (5th Cir.).

Even so, one must take into account the object of Johnson's lawsuit. Again we are faced with the same question of purpose discussed above regarding the strike Presumably the strike settlement agreement settled what ever it was that Guild sought to protect and it obtained in satisfaction CASE's agreement that Johnson's termina tion would be reviewed at a hearing. Enforcement of the agreement must be deemed an extension of the strike in the sense that both had the same purpose. If the purpose was to influence the working conditions of CASI's reployees, the evidence does not affirmatively so show 11 it was to assist Johnson in getting her job back, such . purpose can reasonably be inferred from that fact that the Guild settled for a hearing on that topic. The pate Johnson sought was that of statutory supervisor and the considerations regarding the strike itself still apply Moreover, I am not persuaded that by enveloping John

<sup>10</sup> However, I do not intimate that the illegal nature of the Strike aried through to the Guild's joining Johnson's lawsuit. Presumable the vindication of her rights under the strike settlement agreement, whatever they may have been, would not constitute restraint or coercion are placed before the judiciary. See Clyde Taylor, d/b/a Clyde Taylor Company, 127 NLRB 103 (1960), and Retail Clerks Union Land 100 chartered by Retail Clerks International Association, AFL-CIO (Hughes Markets, Inc., and Gaba Prescription Pharmacy), 218 NLRB 680 at 641 But see the exception to this rule as set forth in Power Systems, Inc. 33 NLRB 445 (1978).

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predicament in a suit to enforce a strike settlement ment that she is any better off under the Act.

nerally, the Board's remedial authority does not d to protecting the job interests of statutory super-Royal Norton Manufacturing Company, 189 NLRB n. 1 (1971), though there are exceptions not pertihere. 11 Thus, even assuming that the strike settleagreement granted Johnson rights which might mally be negotiated for a statutory employee, it does follow that her status is changed to a statutory emyee for the purpose of enforcing the agreement. She a supervisor and not able to obtain protection the Act. Since she is disqualified from protection the Act. employees such as Smith, who seek to her by participating in a court proceeding to enthat agreement, are still not seeking the "mutual or protection" of employees. Thus, even though he have sought the enforcement of a quasi-collectiverealning agreement, the conduct was not protected by etion 7.

inally, Smith makes no claim that Johnson's reinstatent would in any way affect his working conditions He is now employed by AFSCME and his former ployer was CASE (though CASE has now become an illiated local of AFSCME). The Board held in *Puerto* Food Products Corp., supra, that the question of ether or not concerted actions by employees to proan employer's selection or termination of a superviis protected "depends on the facts of each case. In regard [we have] consistently held that where the establish that the identity and capability of the suvisor involved has a direct impact on the employee's job interests they are legitimately concerned with his ntity and thereby have a protected right to protest his mination." (Emphasis supplied.) Here, the facts of this ecific case do not demonstrate that Smith, by testifying the superior court action as an AFSCME employee buld ever cause that court to make a decision which would have a direct impact on his own job interests. In at circumstance, even if the court's decision somehow apacted the employees of CASE's successor, nonetheit could not affect him. Literally, therefore, Puerto Food and Products insulates Respondent from any libility under Section 8(a)(1) or (3) whatever it did to mith for participating in the lawsuit. I recognize that here are cases which extend the right to engage in conerted activity on behalf of stranger employees and perhaps Puerto Rico should not be read so literally. Usually these are the sympathy strike cases such as N.L.R.B. v. eter Cailler Kohler Swiss Chocolates Co., 130 F.2d 503 2d Cir. 1942) (opinion of L. Hand, C.J.); N.L.R.B. v.

Southern Greyhound Lines, Inc., 426 F.2d 1299 (5th Cir. 1970); and Washington State Service Employees State Council No. 18 and Local 6, Service Employees Union affiliated with Building Service Employees International Union, AFL-CIO, 188 NLRB 957 (1971), but there are also cases involving unlawful discipline meted out by an employer to an individual who is not its own employee, thereby extending Section 7 protection to the stranger employee. See, e.g., Fabric Services, Inc., 190 NLRB 540 (1971), and Sandpiper Builders and Trenton Dumphy and John Fincher, d/b/a Dumphy & Fincher and Ernest C. Silkboard, d/b/a Cathedral City Electric, 152 NLRB 796 (1965). Even so, assuming that these cases are inconsistent with Puerto Rico Food Products, an assumption I am not prepared to make, nonetheless as applied to the facts of this case they are distinguishable for Smith's activity here was on behalf of a supervisor and there is no proof that he was making common cause with statutory employees.

Thus, I reach the ultimate conclusion that the General Counsel has failed to show by competent evidence that an object of Smith's giving testimony on behalf of Supervisor Johnson in her lawsuit, though intended to enforce a quasi-collective-bargaining agreement, was for the purpose of influencing either Smith's own working conditions at AFSCME or the working conditions of employees of CASE's successor. I therefore conclude that his testimony was not protected by Section 7 of the Act and shall recommend that the complaint be dismissed.

Upon the foregoing findings of fact, and upon the entire record in this case, I hereby make the following:

#### CONCLUSIONS OF LAW

1. American Federation of State, County and Municipal Employees is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The CASE Guild was at relevant times a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent has not engaged in any violations of Section 8(a)(3) and/or (1) of the Act.

Upon the basis of the foregoing findings of fact and conclusions of law, and upon the entire record in this case, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

## ORDER 12

The complaint is dismissed in its entirety.

Royal Norton involved a runaway shop during the term of a collective-bargaining agreement. Among other things, the Board held that survisors who lost their jobs as a result of the employer's discriminatory ove were not entitled to reinstatement, though the rank-and-file empress were.

<sup>&</sup>lt;sup>12</sup> In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.